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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

PETER J. LINDBERG, as Executor, etc., Plaintiff and Appellant, v. JOHN VERNER et al., Defendants and Respondents.	C033944 (Super.Ct.No. 235458)
JOHN EILERS, Plaintiff and Appellant, v. JOHN VERNER et al., Defendants and Respondents.	(Super.Ct.No. 248769)

In this appeal involving a malicious prosecution action, we conclude the trial court erroneously excluded evidence relating to the motivation for the underlying lawsuit. We therefore reverse the judgment.

FACTS AND PROCEDURAL HISTORY

Defendant John Verner, a real estate developer, entered into two agreements with a local water district to buy nearly 75 percent of the additional capacity of a proposed sewer expansion project. Plaintiffs John Eilers and Linda Lindberg were members of the Land Utilization Alliance (LUA), which opposed the expansion and urged that an environmental impact statement be prepared. Linda Lindberg died in May 1995, and Peter Lindberg, as executor of her estate, was substituted in her place as a party to this action.

On February 7, 1990, Eilers, as president of LUA, wrote a letter to an EPA project coordinator. This letter, which formed the basis for an ensuing defamation action by Verner, was written on LUA stationery and read:

> "I have written a number of letters representing LUA concerning the possible approval of Phase II of the Manteca/Lathrop Sewer Plant without a complete environmental impact statement being done. I am alarmed that EPA continues to drag its feet on an issue that is of prime importance to the people in the area, many of whom have gone on record to support full environmental review.
>
> "As recently as five days ago, I acquired some information of which your agency should be aware. It is my understanding that your agency is responsible in some respect to help

protect the environment. I also understand that your agency is under a great deal of pressure from Representative Richard Lehman and Representative Norman Shumway to approve the above mentioned expansion. It is interesting to note that Richard Lehman's lobbying efforts to get Phase II approved will directly benefit his major political fundraiser/developer John Verner. Mr. Verner will receive out of the Lathrop share of the plant over seventy-five percent (75%) of the new sewer capacity.

"For your information, I am enclosing copies of the agreements that the Lathrop County Water District entered into with developer, John Verner. Most interesting about these agreements is at the time they were entered into no environmental review was completed, nor discussed. The agreements are not site, use, or project specific, and that means that Mr. Verner has 162,000 GPD capacity to use anywhere in the Lathrop County Water District's sphere of influence.

"With San Joaquin County being one of the counties in the state currently in nonattainment for air quality, and with the present growth pressures, it would seem that your agency should take a very strong position to make sure that the environment is protected prior to approving this expansion. There is no need for this expansion at the present time. Within the Lathrop area there there [sic] is approximately an unused capacity of 300,000 GPD. This is enough capacity to last the City of Lathrop through 1994. There is absolutely no reason to allow this expansion, except to help John Verner. It was never my understanding that your agency was in the business of granting sewer expansions for one individual developer.

"Recently, Lathrop's City Attorney Ron Stein was fired with no warning or explanation because he responsibly questioned the propriety of this 'sweetheart' deal of John

> Verner's to his City Council. Mr. Stein has become the second public servant fired within one month over this sewer plant expansion. That second person was EPA's Manteca/Lathrop Sewer Plant Expansion Project Coordinator Gayle Eisner, who lost her job in January of 1990 because she, like Ron Stein, merely asked the Question, 'What's going-on here folks?'
>
> "What is going on here is that there is a virtual time-bomb ready to go off. The public which LUA represents through it's [*sic*] more than 30 organization network is running out of patience. We demand that your agency, EPA, act responsibly and do what should have been done from day one: Process a complete EIS on the Phase II - Manteca/Lathrop Sewer Expansion. LUA is ready to do whatever is necessary to achieve the justice the public deserves. We are not going away!
>
> "The ball is in your court."

The letter showed that copies were being sent to a number of individuals and organizations.

Verner learned of the LUA letter while attending a water board meeting, and he became upset. However, he decided not to respond immediately. The next morning, he received more than 40 telephone calls from business colleagues, developers, and others about the letter. His anger increased, and he became concerned that the LUA letter would adversely affect his business. Verner stated that "[i]f maiming [Eilers's] ass were legal, then I would have maimed him." Instead, he consulted with defendant Michael Babitzke, his longtime friend, business partner, and attorney.

Verner and Babitzke decided to file an action for libel and slander against LUA, Eilers, and Lindberg. The complaint also

named as Doe defendants the members of LUA, organizations affiliated with LUA, and their members.

In his complaint, Verner alleged the following statements were false: (1) EPA was under pressure from Representative Lehman, (2) Lehman's lobbying efforts "will directly benefit his major political fundraiser/developer John Verner," (3) environmental review had not been completed or discussed when Verner entered into agreements with the water district, (4) there was no reason to allow the expansion except to help Verner, (5) the EPA was not supposed to be "in the business of granting sewer expansions for one individual developer," (6) Stein was fired for questioning "the propriety of this 'sweetheart' deal of John Verner's to his City Council," (7) Stein was the second public servant fired within one month over this project, (8) Eisner lost her job with EPA because she questioned the expansion, and (9) "[t]he public which LUA represents through its more than 30 organization network is running out of patience."

Verner alleged these statements were defamatory on their face, because they exposed him to "hatred, contempt, ridicule, and obloquy" by accusing him of "wrongfully influencing public officials to approve a sewer expansion against the public interest and wrongfully influencing public officials to terminate public employees and wrongfully ignoring environmental protection laws enacted on behalf of the public."

Verner further alleged this letter would be taken in a defamatory sense by those who read it, because it would be

understood to mean that Verner "has been guilty of wrongfully influencing public officials against the public interest by ignoring environmental protection laws and causing conscientious public employees to be terminated from their jobs when they stand in his way."

Verner sought general damages of $1 million, special damages of $1 million, and punitive damages of $10 million.

Lindberg demurred to the complaint, noting there was no allegation that she published, or communicated, the allegedly defamatory remarks. The trial court sustained the demurrer, when no amended complaint was filed within the prescribed timeframe, and dismissed the complaint as to Lindberg in July 1990.

In October 1991, Verner filed a request to dismiss the action with prejudice as to the remaining defendants, and the court entered a judgment of dismissal accordingly.

Plaintiffs Eilers and Lindberg then filed an action for malicious prosecution against Verner and Babitzke. They asserted Verner's defamation action had legally terminated in their favor, was brought without probable cause, and was initiated with malice.

As to the probable cause element, plaintiffs asserted the letter contained true allegations and could not reasonably be read as defaming Verner. They also claimed the letter contained statements of opinion rather than fact and that Verner was a limited public figure who had no reasonable belief that plaintiffs acted with malice. They further asserted the letter

was absolutely privileged as a communication on a matter of common interest. (Civ. Code, § 47, subd. (c).)

The trial court entered summary judgment in favor of Verner and Babitzke, finding a claim for malicious prosecution could not prevail, because there had in fact been probable cause to bring the defamation lawsuit.

Plaintiffs appealed, and this court reversed in *Lindberg v. Verner* (Oct. 30, 1996, C019439 [nonpub. opn.]). We concluded neither Verner nor Babitzke had probable cause for bringing their action, "because the letter forming the basis for the suit did not defame Verner and could not reasonably read in such a fashion."

In footnote 10 of our decision, we emphasized that the only question before us involved the element of probable cause: "There is no dispute concerning the remaining elements of the malicious prosecution action. The defamation action was brought by Verner and Babitzke and concluded in favor of Eilers and Lindberg when dismissed with prejudice. Questions of fact remain on the question of whether the defamation action was initiated with malice. Although Verner asserts he brought suit to protect his reputation, there was also evidence that other developers in the area urged Verner to sue LUA and those active in the organization because they were 'extortionists' and 'liars.' One developer, through its attorney, offered to assist with any litigation that Verner might bring. . . ."

Following our decision, the malicious prosecution action proceeded to trial.

Defendants sought to preclude plaintiffs from introducing evidence of conversations between Verner and three other people from the development community. In one such conversation, Nelson Baylor told Verner he "should sue because [plaintiffs] are extortionists, that they don't keep their word, they are liars, and if he could assist in any way, he would be happy to." In a later conversation, Baylor told Verner, "Go get him, good luck, keep us posted."

Jerry Sperry also encouraged Verner to sue Eilers and offered assistance. Sperry told Verner: "[B]ury the son of a bitch, go get him, help us all out."

Howard Arnaiz voiced similar sentiments, telling Verner to go forward and "bury the sons of a bitches." Later, referring to Eilers, he told Verner "If you get the son of a bitch on the floor don't let him up."

Defendants asserted these statements demonstrated only the state of mind of the speakers, not defendants, and were therefore irrelevant. They also argued this testimony would be unduly inflammatory and would require an undue consumption of time. They added that there was no evidence that Verner had ever conveyed these messages to Babitzke. Finally, they asserted the statements by Arnaiz were made after the initiation of the lawsuit and were therefore irrelevant to the litigation.

Plaintiffs countered that the support and encouragement Verner received from fellow developers was directly relevant to the issue of malice and may have influenced Verner in bringing and/or maintaining his lawsuit.

The trial court excluded this evidence. Exercising its discretion under Evidence Code section 352 (further undesignated statutory references are to the Evidence Code), the trial court determined these statements "to be more prejudicial than probative and no more indicative of the state of the mind of the litigants themselves."

Plaintiffs renewed their efforts to admit this evidence after defendants testified at trial. They asserted these conversations were relevant to demonstrate that the lawsuit was not brought in good faith but was instead brought to coerce and threaten LUA and its members. They noted that Verner had stated he had contacted Babitzke after receiving telephone calls, "after, you know, several days of bullshit and criticism and ridicule and everything else from so damn many people . . . ." Plaintiffs argued that some of the calls he received were from "developers or attorneys or colleagues of the developers who talked to Mr. Verner and related to him the recommendations and encouragement to sue Mr. Eilers." Plaintiffs urged that this evidence be admitted "to give the jury the entire picture."

The court denied plaintiffs' request, reiterating its previous finding that "the probative value of any of these conversations is substantially outweighed by the prejudicial potential they have. [¶] My concern is I don't want to turn this trial into developers versus environmentalists or vice versa. And so far all I've heard is evidence that perhaps Mr. Eilers is not popular in the development community. But I have heard nothing that says that was the thought process or

motivation or rationale of Mr. Verner in deciding to file the lawsuit." The court added: "The testimony is reflective of the thought processes of the speakers not of the defendants here. And unless there's some further indication that this was, in fact, the motivation for the filing of the action, . . . [i]t is going to be excluded."

Plaintiffs raised this issue a third time near the close of trial, but the court held fast to its previous ruling, stating: "I still see nothing there, which is not more prejudicial than probative. My concern about this is that if it comes in, the only possible use that the jury could make of it is that the entire development community of San Joaquin is now teamed up against Mr. Eilers."

At trial, defendants testified about their reasons for bringing the defamation lawsuit, and they described the research undertaken before filing the complaint. Plaintiffs introduced evidence relating to the legal expenses they incurred and other damages they claimed to have suffered.

The jury came to different conclusions about the two defendants. In its special verdict, the jury found that Verner did not maliciously institute or maintain the defamation suit against plaintiffs but that Babitzke had. It awarded Lindberg attorney fees of $3,092.30 and awarded Eilers $30,962.43, one-half of his claimed attorney fees but did not award any noneconomic damages. The jury further concluded that Babitzke's conduct was not intended to injure plaintiffs, and was not

carried out with a willful and conscious disregard for the rights of others.

Eilers moved for a judgment notwithstanding the verdict. He challenged only the amount of damages awarded by the jury, asserting the undisputed evidence demonstrated he had incurred attorney fees of $61,924.86. The trial court denied the motion, and this appeal followed.

DISCUSSION

I

Evidence of the Telephone Conversations

Plaintiffs assert that the trial court erred in excluding evidence of the conversations between Verner and others from the development community. They argue this evidence was relevant to the issue of malice and should have been admitted. We agree.

Although the court did not cite section 352 by number, it is apparent the trial court made its evidentiary ruling based on section 352, finding that the potential prejudice of the proffered evidence outweighed its probative value. While the trial court possesses broad discretion in making such a determination, that discretion is not absolute. (***Bihun v. AT&T Information Systems, Inc.*** (1993) 13 Cal.App.4th 976, 989, disapproved on other grounds in ***Lakin v. Watkins Associated Industries*** (1993) 6 Cal.4th 644, 664.)

"Reasonable exercise of trial court discretion pursuant to . . . section 352 requires that the trial judge balance the probative value of the offered evidence against its potential of

prejudice, undue consumption of time, and confusion. [Citation.] That balancing process requires consideration of the relationship between the evidence and the relevant inferences to be drawn from it, whether the evidence is relevant to the main or only a collateral issue, and the necessity of the evidence to the proponent's case as well as the reasons recited in section 352 for exclusion. [Citation.] The more substantial the probative value of the evidence, the greater the danger of the presence of one of the excluding factors that must be present to support an exercise of trial court discretion excluding the evidence." (*Kessler v. Gray* (1978) 77 Cal.App.3d 284, 291.)

To establish a claim for malicious prosecution, a plaintiff must prove that the prior action (1) terminated in favor of the plaintiff, (2) was brought without probable cause, and (3) was initiated with malice. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 871.) The excluded evidence related to this last element.

Malice focuses on "the subjective intent or purpose with which the defendant acted in initiating the prior action, and past cases establish that the defendant's motivation is a question of fact to be determined by the jury." (*Sheldon Appel Co. v. Albert & Oliker, supra*, 47 Cal.3d at p. 874.) "Malice means actual ill will or some improper purpose, whether express or implied. [Citations.] It may range anywhere from open hostility to indifference." (*Grindle v. Lorbeer* (1987) 196 Cal.App.3d 1461, 1465.)

The trial court minimized the probative value of the conversations Verner had with Baylor, Sperry and Arnaiz by concluding they were indicative of the speakers' mindsets and did not bear on Verner's own motivations in bringing suit. We do not agree.

As courts have long recognized, malice is generally inferred from facts and circumstances. (E.g., *Lyon v. Hancock* (1868) 35 Cal. 372, 377.) While Verner may have discounted the statements made by his associates and colleagues, and could have testified to that effect, it is also possible that these urgings played a role in Verner's decision to bring suit. The effect of a conversation on a listener may be highly relevant to the listener's motivation for a subsequent act. That effect may be demonstrated explicitly, such as by a comment in response. But proving effect does not require such an express statement. Effect may also be demonstrated by evidence of actions taken in response to a statement. Both types of responses are probative.

The statements made by Baylor, Sperry and Arnaiz are of course relevant to the speakers' states of mind. But they are also relevant, because they may have influenced Verner's subsequent actions. Verner may have decided to file his suit after considering the urgings of his associates to "get" plaintiffs, "bury" Eilers, and "help us all out." Verner was certainly free to deny at trial that these statements played any role in his decision to sue plaintiffs, and the jury could then have decided whose claim to believe. The fact that the jury

could have made a determination either way does not negate the probative value of this evidence.

Defendants point out that these conversations occurred at different times: Some occurred before the suit was filed, and at least one, the conversation with Arnaiz, occurred afterward. However, an action for malicious prosecution lies not only for lawsuits maliciously filed but also for lawsuits maliciously continued. (*Curtis v. County of Los Angeles* (1985) 172 Cal.App.3d 1243, 1252.) Maliciously prosecuted cases cause defendants to incur onerous costs throughout the course of the litigation. And, as long as a maliciously prosecuted case continues, the court calendar is clogged and the judicial process adversely affected. (See *Crowley v. Katleman* (1994) 8 Cal.4th 666, 693.)

In keeping with BAJI No. 7.30, the trial court instructed the jury that the elements of malicious prosecution include that the defendant "initiated or was actively instrumental of [*sic*] the commencement *or maintenance* of a civil proceeding against the plaintiff," "acted without probable cause in commencing *or maintaining* the civil action," and "acted with malice." (Italics added.) The court further informed the jury that "[i]t is undisputed by the parties and you are therefore instructed that Defendants Verner and Babitzke each initiated or was actively instrumental in commencing *and maintaining* the prior civil action. [¶] Accordingly, this essential plaintiffs' claim is established and is not at issue in this trial." (Italics added.)

In short, it is immaterial that some of these conversations may have occurred after the lawsuit was filed, as they may nonetheless have provided an impetus for Verner to maintain the action.

In analyzing the conversations under section 352, the court also concluded the evidence was overly prejudicial, because it would lead the jury to conclude that "the entire development community of San Joaquin is now teamed up against Mr. Eilers." The court misperceived the nature of "prejudice" in the context of section 352.

As numerous courts have noted, "prejudicial" and "damaging" are not synonymous terms. (E.g., *People v. Karis* (1988) 46 Cal.3d 612, 638; *Bihun v. AT&T Information Systems, Inc., supra*, 13 Cal.App.4th at p. 989.) For purposes of section 352, prejudice means evidence that is likely to evoke an emotional bias and that has little relevance to the matters at issue. (*People v. Minifie* (1996) 13 Cal.4th 1055, 1070-1071.) Evidence is prejudicial if it causes the jury to prejudge a matter on the basis of extraneous factors. (*Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1009.) "In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction." (*Ibid*.)

"[T]he idea that evidence should be excluded because it is 'highly prejudicial' to a litigant's case is a classic error.

Often the most highly probative evidence is also highly damning, and therefore 'prejudicial' in a superficial sense of the word. [S]ection 352 does not, however, allow for the exclusion of evidence merely because it is 'prejudicial' in the sense of damaging to a litigant's position. The relevant phrase from the statute is 'substantial danger of undue prejudice.' . . . Undue prejudice springs from evidence which has '"'very little effect on the issues.'"'" (*O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563, 575, italics omitted.)

Here, plaintiffs theorized that Verner filed and maintained his lawsuit at least in part due to the urgings of other developers who wanted to punish plaintiffs for their actions. The relationships between the parties were relevant to the case and, as discussed previously, the proffered evidence bore on the issue of malice. These conversations do not relate to extraneous matters likely to evoke an emotional bias. Instead, they were relevant to a critical issue. The trial court erred in invoking section 352 to exclude this evidence from the jury's consideration. (See *Hilliard v. A. H. Robins Co*. (1983) 148 Cal.App.3d 374, 400.)

The trial court's ruling cannot be considered harmless error. Defendants point out that the jury found that Verner did not act maliciously, even though evidence was admitted that Verner was angry about the lawsuit and had stated in his deposition that he would have liked to "maim [Eilers'] ass." Defendants argue that, because the jury found this evidence insufficient to establish malice, the conversations with the

developers would have added nothing. We cannot agree. The conversations with other developers are relevant to establishing malice under a different theory, namely, that Verner did not act on a belief of the justness of his causes of action but instead at the behest of others in the development community in order to silence LUA and its members. Again, while a jury may have rejected such a theory, the court's ruling deprived the jury of the opportunity to consider such a theory. Under these circumstances, the verdict must be reversed as to Verner.

The verdict must also be reversed as to Babitzke, because the exclusion of this evidence may have affected the jury's decision not to award punitive damages against him. In arguing otherwise, Babitzke emphasizes that there was no evidence that he knew of the developers' comments. However, plaintiffs obviously could not present such evidence after the trial court ruled these conversations were not "indicative of the state of the mind of the litigants," including Babitzke. The ruling assumed that Babitzke knew of the conversations but that they were not indicative of his state of mind. We are bound by the trial court's assumption for purposes of resolving this issue on appeal. Moreover, reasonable inferences drawn from the evidence that was presented allow one to conclude that Babitzke knew the details of the telephone conversations. The relationship between Babitzke and Verner was far more than that of attorney and client. The men had known each other since high school and considered themselves to be "[c]lose friends." Babitzke had invested in a number of Verner's real estate ventures. When

Verner came to consult with Babitzke about the LUA letter, the two met for approximately one hour. The phone calls from the developers were apparently discussed at that meeting, because Babitzke testified he relied on the fact that Verner "was receiving all these phone calls" in assessing the potential damage to Verner's business interest.

Given the close, longstanding relationship between Verner and Babitzke, it would be surprising if Verner had not recounted the content of his conversations with the developers to Babitzke. In that event, the jury should have been allowed to decide whether that knowledge played any role in Babitzke's decision to file and pursue a lawsuit on Verner's behalf.

Again, we reiterate that a jury might have concluded that the conversations had no effect on either Verner or Babitzke. However, that was a determination for the jury to make after being apprised of all relevant evidence. Because the trial court erroneously excluded evidence of the conversations between Verner and his associates, and the jury was prevented from considering this question, reversal is compelled. (See *O'Mary v. Mitsubishi Electronics America, Inc., supra,* 59 Cal.App.4th at pp. 576-577; *Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 677.)

Finally plaintiff Eilers reiterates his claim that the jury erred in awarding only half of his incurred attorney fees. Given our conclusion that the court's evidentiary ruling was erroneous and compels reversal as to both defendants, we do not resolve this additional claim.

The parties disagree regarding the issues to be decided on retrial as to Babitzke. Plaintiff contends the matter should be remanded as to Babitzke for retrial only on the question of damages and not liability. Babitzke and Verner argue that the issues on retrial should not be so limited. Verner argues he would be prejudiced by a limited remand as to Babitzke in part because the jury would know that a previous jury had found that Babitzke acted with malice and that Babitzke's liability "might be inferred [*sic*] to Verner" because Babitzke was Verner's attorney. Babitzke sees prejudice in a retrial that is limited to the issue of punitive damages as to him. He argues that because he had been found liable for malicious prosecution by a previous jury, the next jury may not appreciate the conceptual difference between the malice necessary to a finding of malicious prosecution and malice necessary to an award of punitive damages.

At common law, "there was no practice of setting aside a verdict in part. If the verdict was erroneous with respect to any issue, a new trial was directed as to all." *Gasoline Products Co. v. Champlin Refining Co.* (1931) 283 U.S. 494, 497 [75 L.Ed. 1190].) But it is now firmly established that an appellate court has the power to order a retrial on a limited issue or issues. (*Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 776.) Even so, "where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone

may be had without injustice." (*Gasoline Products Co. v. Champlin Refining Co., supra,* at p. 500.)

We find Verner's and Babitzke's concerns regarding the confusion and uncertainty that may arise from a limited remand persuasive. While careful instructions could conceivably avoid Babitzke's stated concerns, it remains true that evidence fully exploring the matter of these telephone conversations might lead a new jury to decide the issue of Babitzke's malice in filing and maintaining the defamation action differently. To best preserve the right of each of the parties to a fair trial and avoid injustice, the better alternative is to reverse the judgment in its entirety. (See *Gasoline Products Co. v. Champlin Refining Co., supra,* 283 U.S. at p. 500.)

DISPOSITION

The judgment is reversed. Plaintiffs are awarded their costs on appeal.

HULL, J.

We concur:

RAYE, Acting P.J.

KOLKEY, J.